

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
The Commission's Cable Horizontal and)	MM Docket No. 92-264
Vertical Ownership Limits)	

REPLY COMMENTS OF TIME WARNER CABLE

Time Warner Cable believes that the opening comments of NCTA adequately address the issues raised in the Commission's *Second Further NPRM* in this proceeding and joins them as if fully incorporated herein. Thus, Time Warner Cable does not believe it necessary to burden the record with a lengthy submission that reiterates points made by others. Time Warner Cable does, however, feel compelled to respond to the comments of two parties — DirecTV and The America Channel — that have used this proceeding to rehash arguments that they recently made in connection with Time Warner Cable's proposed acquisition of certain cable systems from Adelphia.¹ The arguments that these parties made were unpersuasive then, and they are unpersuasive now.

I. THERE ARE NO PERSUASIVE ARGUMENTS IN THE COMMENTS OF DIRECTV.

DirecTV argues that the Commission should restrict regional concentration with a view to preventing cable operators from entering into exclusive agreements with regional sports networks ("RSNs"). DirecTV argues that, as a cable operator expands its footprint

¹ See, e.g., DirecTV Comments at 5 & n.12 ("[a]s DirecTV has recently described in more detail") (citing comments that DirecTV submitted in connection with the proposed Adelphia transaction); The America Channel Comments at 24 & n.27 (citing "its analysis of the Adelphia transactions").

within an RSN's footprint, it becomes more likely that the cable operator and the RSN will enter into an exclusive agreement.² According to DirecTV, "where the cable operator controls a large share of the viewers, the 'cost' of withholding programming from rivals may be outweighed by whatever premium the cable operator is willing to pay for the exclusivity."³ DirecTV does not argue that its concern justifies a regional subscriber limit,⁴ but it does say that the Commission should "examine regional concentration issues" as part of the "merger review process."⁵

At the outset, it is appropriate to note the self-serving nature of DirecTV's reasoning. Among multichannel video programming distributors ("MVPDs"), the most prolific practitioner of exclusivity is DirecTV itself. DirecTV has long had exclusive agreements for NFL Sunday Ticket and similar programming, whose power to make consumers switch MVPDs is well documented.⁶ DirecTV wields that exclusivity not only against cable operators but also against EchoStar (which has complained of it strenuously⁷) and other

² DirecTV Comments at 4-5 ("where a single provider controls a sufficient number of subscribers within a region, it can arrange to withhold or raise the price of 'must have' regional programming from its rivals").

³ *Id.* at 5.

⁴ *Id.* at 6 ("regional caps, while perhaps useful, are not necessary at this time").

⁵ *Id.* at 10.

⁶ See, e.g., Monica Hogan, *Further To Fly: DirecTV Continues To Grab Market Share Despite Stepped Up Competition*, Multichannel News, May 23, 2005, at 65 ("Analysts credit its exclusive NFL Sunday Ticket package with driving DirecTV's market share, and they point to the urgency of maintaining that exclusivity."); Allison Romano, *DirecTV Hangs on to the Ball*, Broad. & Cable, Dec. 16, 2002, at 1 ("It's estimated that about 1 million of DirecTV's 11 million subs buy the football package.").

⁷ See, e.g., Amended Complaint, *EchoStar Communications Corp. v. DirecTV Enters. Inc.*, No. 00-K-212, ¶ 63 (D. Colo. filed Apr. 5, 2001) ("DirecTV's exclusive dealing agreements with the NFL and other sports leagues . . . will effectively bar EchoStar from

competitors, including newly entering telephone companies. DirecTV's objective in this proceeding is transparent: by seeking to avoid generally applicable rules restricting exclusivity, and by seeking to have exclusivity considered only in the context of cable mergers, DirecTV attempts to ensure that it can continue to rely on exclusivity while tying its competitors' hands behind their backs.

If DirecTV were to get its way, consumers would be harmed — not helped. It is well established that, as a general matter, exclusive arrangements do not harm competition but, rather, intensify it.⁸ Exclusive arrangements allow distributors to distinguish their service offerings without the danger that they must share with competitors the fruits of successful investments while having to shoulder unsuccessful investments by themselves.⁹ Thus,

offering premium out-of-market (or 'distant') sport programming to DISH Network customers. Each of these agreements lasts for a number of years, and each includes an exclusive re-negotiation period that precludes the sports league from even speaking with EchoStar about submitting a bid for the future rights to broadcast such programming."); *id.* ¶ 65 ("DirecTV's actions were designed to exclude EchoStar from the high-power DBS market, and thus to harm EchoStar. In fact, DirecTV's actions have directly and proximately harmed EchoStar by foreclosing it from including — or even bidding to include — these crucial sports broadcasts in its programming package, putting EchoStar at a competitive disadvantage. The ability to offer a wide array of distant NFL games and games of other sports leagues is a significant programming advantage for DirecTV over EchoStar.").

⁸ See, e.g., *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, First Report and Order, 8 FCC Rcd 3359, ¶ 63 (1993) ("the public interest in exclusivity in the sale of entertainment programming is widely recognized"); *United Video, Inc. v. FCC*, 890 F.2d 1173, 1179-80 (D.C. Cir. 1989) (syndicated exclusivity rules "give the local broadcaster a competitive tool that it can use both to call attention to the particular program and to alert viewers to the general attractiveness of the broadcaster's whole range of programming") (internal quotation marks omitted).

⁹ See, e.g., Economists, Inc., *Competition for Video Programming: Economic Effects of Exclusive Distribution Contracts*, at 2 (Dec. 3, 2001) ("[E]xclusivity makes the incentives of distributors and programmers more compatible, reduces inefficient free riding, and permits economies of scale and specialization in each stage of program production and distribution.

exclusive arrangements promote investment in new programming that, without exclusivity, might not have come into existence.¹⁰ A one-sided prohibition on exclusive arrangements by cable operators would unfairly hamstring cable operators while depriving consumers of innovative programming.

Conscious of these facts, the 1992 Congress decided to restrict exclusivity only in certain “limited, targeted, and temporary” ways,¹¹ which DirecTV’s proposal would well exceed.¹² As this Commission has previously acknowledged, the express statutory limitations counsel strongly against restricting exclusive agreements more broadly.¹³ Indeed, given the carefully reticulated statutory scheme, it is doubtful that the Commission possesses “statutory

Exclusivity also permits MVPDs to compete more vigorously by differentiating their products. The effect of exclusivity therefore is to increase both the quantity and quality of video programming (and thus, presumably, the diversity of program content) by increasing incentives to invest in programming.”), attached to Comments of Cablevision Systems Corp., *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act, Sunset of Exclusive Contract Prohibition*, CS Docket No. 01-290 (FCC filed Dec. 3, 2001).

¹⁰ Cf. 47 U.S.C. § 548(c)(4)(C) & (D) (acknowledging the concern).

¹¹ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act, Sunset of Exclusive Contract Prohibition*, Report and Order, 17 FCC Rcd 12124, ¶ 65 n.206 (2002) (“2002 Program Access Order”).

¹² See *id.* § 548(c)(2)(D) (prohibiting exclusivity only insofar as it concerns satellite-delivered video-programming services that are vertically integrated).

¹³ *General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, For Authority to Transfer Control*, Memorandum Opinion and Order, 19 FCC Rcd 473, ¶ 291 (2004) (“*News Corp./DirecTV Order*”) (“expand[ing] the exclusivity provision to non-vertically integrated programmers . . . would directly contradict Congress’ intent in limiting the program access provisions to a specific group of market participants”); *2002 Program Access Order* ¶ 74 (“Such an expansion would directly contradict Congress’ intent in limiting the program access provisions to a specific group of market participants.”).

authority” to adopt broader restrictions at all.¹⁴ Besides, any concern with cable exclusivity has lost all force since 1992: if cable operators ever had any market power, they have surely lost it since then.¹⁵

If there nonetheless remains any concern about exclusivity (presumably, a concern unrelated to the existence of market power), then it should be addressed in a proceeding specifically devoted to that topic — not in the context of individual merger reviews. As the Commission has previously recognized, arguments like those of DirecTV — to the extent that they raise concerns at all — should be addressed with respect to all market participants (including DBS operators), and not just with respect to parties that happen to be involved in a merger.¹⁶

That approach is particularly sound because there is no reason to believe that exclusivity has anything to do with the regional concentration that sometimes results from mergers. DirecTV’s contrary argument is apparently based on the premise that exclusive agreements must cover an RSN’s entire footprint (so that, when a cable operator’s footprint comprises only part of the RSN’s footprint, part of the premium that must be paid for

¹⁴ 2002 *Program Access Order* ¶ 74; see *American Petroleum Inst. v. EPA*, 52 F.3d 1113, 1119 (D.C. Cir. 1995) (agency “cannot rely on its general authority to make rules necessary to carry out its functions when a specific statutory directive defines [its] relevant functions . . . in a particular area”); *Asiana Airlines v. FAA*, 134 F.3d 393 (D.C. Cir. 1998) (same).

¹⁵ See S. Rep. No. 102-92, at 28 (“The Committee believes that exclusivity can be a legitimate business strategy where there is effective competition.”).

¹⁶ See *News Corp./DirecTV Order* ¶ 291 (“[i]n several prior mergers involving MVPDs, the Commission has rejected arguments that the post-merger entity should be required to abide by an exclusivity restriction with respect to programming of unaffiliated programming vendors”).

exclusivity is wasted).¹⁷ But a cable operator has no incentive to buy exclusivity that benefits neighboring cable operators — only to restrain an RSN from licensing a rival MVPD to sell the RSN's programming inside the cable operator's own franchise area. Accordingly, if the exclusivity premium for an RSN's entire footprint would be, say, \$100, a cable operator with only a quarter of that footprint would be willing to pay only \$25, and a cable operator with half the RSN's footprint will pay only \$50. DirecTV has never pointed to any reason to believe that, on a per-subscriber-basis, the premium for exclusivity decreases as a cable operator's cluster size increases.¹⁸

Even if increased clustering and exclusivity were positively correlated, the correlation must be weak. There are many cable clusters currently in existence that are much larger than some of the clusters at issue in the Adelphia transaction but that have never given rise to any exclusivity at all. Conversely, the most prominent examples of exclusivity — including the NFL Sunday Ticket programming described above — have nothing to do with cable

¹⁷ See DirecTV Comments at 5 (“where the cable operator controls a large share of the viewers, the ‘cost’ of withholding programming from rivals may be outweighed by whatever premium the cable operator is willing to pay for the exclusivity”); Comments of DirecTV at 12, *Applications of Adelphia Communications Corp., Comcast Corp., and Time Warner Cable Inc.*, MB Docket No. 05-192 (filed FCC July 21, 2005) (“[A]s a cable operator controls more MVPD subscribers in a given geographic area, an RSN operating in that area gains more from distribution on the cable system and *loses less* if it denies distribution to the cable operator's rivals.”).

¹⁸ See Declaration of Junusz A. Ordoover and Richard Higgins ¶ 39 (“Despite the fact that DirecTV alleges that the transactions will provide the incentive and ability of Comcast (and Time Warner) to enter into exclusive arrangements with unaffiliated RSNs, DirecTV's economists — Dr. Bamberger and Dr. Neumann — do not present any analysis of this theory.”) (Exhibit G, submitted with Adelphia Communications Corp., Comcast Corp. & Time Warner Inc., Reply, *Applications for Consent to the Assignment and/or Transfer of Control of Licenses*, MB Docket No. 05-192 (filed FCC Aug. 5, 2005) (“*Adelphia Reply*”)).

clustering, but rather have occurred in the DBS industry. At the same time, cable clustering yields myriad well-documented consumer-welfare gains resulting from enhanced efficiency.¹⁹ To sacrifice those known benefits to a speculative notion that limiting clustering might inhibit exclusivity would be poor policy, particularly when it is doubtful that exclusivity is harmful to consumer welfare in the first place.

II. THERE ARE NO PERSUASIVE ARGUMENTS IN THE COMMENTS OF THE AMERICA CHANNEL.

Like DirecTV, the America Channel recycles arguments that it previously made in the *Adelphia* proceeding. The America Channel reiterates its claim that Comcast and Time Warner Cable discriminate against “independent” video-programming services, which it defines as video-programming services that are not owned by Comcast, Time Warner, Viacom, News Corp., NBC Universal, or Disney. As proof, the America Channel primarily relies on its own inability to obtain carriage and on a supposed survey that it says shows that very few “independent” channels (as it defines them) are carried by Comcast and Time Warner Cable.

As for the America Channel’s own inability to obtain carriage, we previously explained that the America Channel “is nothing more than a vague programming concept that is seeking to resuscitate its faltering business plan through threats of litigation rather than quality programming.”²⁰ In a free and open marketplace, some video-programming services will fail to obtain carriage because of nothing more nefarious than concerns over their quality and lack of capacity to carry every interested programmer. Thus, logically, the America

¹⁹ See *Adelphia Reply* at 9-19.

²⁰ *Id.* at 79.

Channel's failure to obtain carriage cannot be used to prove discrimination against independent video-programming services.

As for the America Channel's supposed survey, it is fundamentally flawed. The America Channel counts a channel as "affiliated" whenever it is owned by Comcast, Viacom, News Corp., NBC Universal, or Disney. But Time Warner Cable has no financial interest in any of these companies and therefore has no incentive to favor them over independent video-programming services. If Time Warner Cable carries their video-programming services, it must be for reasons other than corporate affiliation, since they are not, in fact, corporate affiliates. The America Channel's definitional sleight-of-hand renders its survey results unusable: the America Channel eliminates from the data-set the video-programming services that are owned by some of the most expert launchers of video-programming services, thereby leaving uncounted the independent services that are the most likely to succeed. The America Channel's way of counting is thus unreliable and self-serving.

Conclusion

For the reasons set forth above, the Commission should not adopt any regional or national subscriber limits.

Respectfully submitted,



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